BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREW NOWACHEK	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,904
MID-WEST CONVEYOR CO., INC.	)	
Respondent	)	
AND	)	
	)	
HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the May 8, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Claimant filed both for a preliminary hearing and for post-award medical treatment. The ALJ determined the appropriate way to proceed was to handle the matter as a preliminary hearing.[1] No objection was raised by either party with this decision.[2]

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for the claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent and its insurance carrier. Richard H. Wagstaff, III, of Kansas City, Missouri, appeared for the Kansas Workers Compensation Fund (Fund).

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[1] P.H. Trans. at 4.

[2] Because the ALJ decided to proceed with a preliminary hearing, utilizing the procedure under K.S.A. 44-534a instead of the post award medical procedure under K.S.A. 44-510k, this is not an appeal from a final order. Accordingly, this appeal will be heard and decided by a single board Member as permitted by K.S.A. 44-551(I)(2)(a), as opposed to being determined by the entire Board as when the appeal is from a final order. See: *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92 (2011), *rev. denied* (Jan. 20, 2012).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations as did the ALJ and considered the same record, including the Preliminary/Post Award Hearing transcript dated April 10, 2013, with the attached exhibits and the documents filed of record with the Division.

ISSUES

The ALJ found the preponderance of the evidence showed no injury to the rotator cuff in claimant's right shoulder; determined the identified injuries to the labrum and AC joint were degenerative, age-related conditions and therefore not direct natural consequences of the approximately eleven months of part-time cane use described by claimant; and found an extensive tear of the biceps tendon was not degenerative in nature and likely was the result of the claimant bearing weight on a cane with his right hand.

The ALJ went on to order respondent and the Fund to provide claimant with biceps tenotomy surgery, with orthopedic surgeon Cris D. Barnthouse, M.D., as the authorized treating physician, and ordered if the claimant and Dr. Barnthouse elected to proceed at the same time with the recommended procedures other than the biceps tenotomy, the liability of the respondent, insurance carrier, and Fund would be limited to the expenses necessitated by the biceps tenotomy alone. The expenses of the biceps tenotomy surgery were ordered paid 70% by the Fund and 30% by the respondent and insurance carrier as was agreed at the time of the original settlement in this matter.

The claimant requests review of the ALJ's Order, arguing that, although the ALJ correctly determined he suffered a secondary injury to his shoulder from using a cane to compensate for the primary injury to his low back, the ALJ erroneously apportioned the obligation to provide treatment between preexisting and acute pathology. Claimant requests review of whether he suffered personal injury by accident to his right shoulder arising out of and in the course of his employment. More particularly, claimant contends the injuries to the labrum and AC joint, though degenerative, were aggravated by claimant's ongoing use of a cane, necessitated by his long-term low back problems. Claimant contends the entire surgical treatment for his shoulder should be ordered paid by respondent and the Fund as authorized medical treatment.

Respondent argues that the Order should be reversed and medical treatment denied all together, contending claimant's right shoulder problems stem from an injury in 2002, for which claimant received medical treatment, including surgery, or, in the alternative the award of limited medical treatment should be affirmed.

The Fund supports respondent's argument that medical treatment should be denied totally, or, in the alternative, agrees with respondent that the Order should be affirmed in terms of the limited medical treatment authorized by the ALJ.

FINDINGS OF FACT

Claimant originally suffered a work-related accident to his low back on November 18, 1991. This accident led to surgery by Dr. Robert Takacs on March 27, 1995. A settlement of this claim occurred on August 2, 2001, with claimant retaining the right to request future medical treatment and a review and modification of the award. The award was shared between respondent and the Fund, with the Fund paying 70 percent and respondent paying 30 percent. Claimant continued working for respondent until 2002, when the plant closed. He then began working for his current employer, Pentair, Fairbanks Morse Pump, in a supervisory capacity, performing a sedentary job in a warehouse. Claimant was provided with a scooter to aid in the performance of his job duties. Claimant is still employed with Pentair, but has not worked since May 13, 2012.

Claimant's back condition has become progressively worse, and required ongoing medical attention, which for a time, was provided by board certified neurological surgeon Geoffrey L. Blatt, M.D. Claimant testified that his ongoing back problems caused his left leg to drag, necessitating that he regularly use a cane prior to November of 2011. He underwent fusion surgery on June 21, 2012, with Dr. Blatt, and used the cane for about two months after the surgery. The extended use of the cane caused pain to develop in claimant's right shoulder. This caused a need for medical treatment for the shoulder, in addition to the back treatment. Dr. Blatt noted claimant's decreased movement of the right shoulder and recommended physical therapy for the shoulder along with pain medication.

Claimant came under the care of Dr. Barnthouse for the shoulder complaints, on December 5, 2012. A December 7, 2012, MRI of the shoulder suggested chronic long head biceps tendon damage with a likely degenerative labral tear. There was also evidence of chronic supraspinatus tendinosis without obvious cuff disruption and a moderate joint effusion intra articularly. Dr. Barnthouse determined claimant's use of the cane was the source of his increased pain and the current need for medical treatment. Dr. Barnthouse acknowledged the causality of claimant's actual structural injury can be difficult to ascertain, but, in his opinion, those conditions "are likely to have existed and are aggravated by the use of a cane."[3]

Claimant has a history of right shoulder problems associated with his work with respondent. In April 2002, he developed shoulder problems and was referred for treatment with Scott Schneider, M.D., of the Kansas City Orthopaedic Institute, and Lowry Jones Jr. M.D., of the Dickson-Diveley Midwest Orthopaedic Clinic. He was diagnosed with subscapular bursitis and, following injections which provided only temporary relief, underwent surgery on March 31, 2003, with Dr. Jones as the surgeon and Dr. Schneider as the assistant. The surgery was successful in that claimant's pain was significantly decreased. The final exam, on May 29, 2003, indicated claimant's primary posterior

[3] P.H. Trans., Cl. Ex. 1 at 1 (Jan. 11, 2013, letter).

shoulder pain had resolved although there were minor posterior shoulder complaints. Claimant was found to have complete range of motion with good strength against resistance. Claimant was found to be at maximum medical improvement on January 9, 2004. Claimant testified that after the surgery, he returned to work and performed his normal job duties without problem. Claimant settled his right shoulder claim on October 28, 2004, and was provided right shoulder restrictions by Dr. Jones. Claimant was rated at 5 percent to the upper extremity at the level of the shoulder.

Claimant was originally referred to Dr. Blatt, by Robert J. Takacs, M.D., in March 2006. At that time claimant was complaining of back and bilateral leg discomfort, with the problems originating in 1991, while working for respondent. Claimant reported a recent worsening of his back complaints, noting difficulty standing for any time and described a feeling that his legs were getting heavy. Claimant also described dragging his feet, with a leg drop. An MRI scan of claimant's lumbar spine on February 10, 2006, identified the fusion from L4 to S1as appearing solid. There was also a disc bulge with spinal stenosis at L2-3 and L3-4 and scoliosis at L5-S1. An MRI scan of claimant's cervical spine also identified scoliosis from claimant's cervical spine all the way to claimant's lumbar spine. Because of the extent of claimant's prior surgery, Dr. Blatt was reluctant to perform any additional fusion surgery. No additional medical treatment was undertaken at that time. Claimant returned to Dr. Blatt on February 1, 2008, with similar complaints but no additional treatment was undertaken.

Claimant continued his treatment with Dr. Blatt through 2009, with a new MRI performed in August. Claimant developed claudication and radiculopathy associated with the stenosis and again expressed reluctance to undergo any additional surgery. Claimant chose to undergo epidural injections, which provided little if any benefit.

In 2010, claimant was examined and treated by Danny M. Gurba, M.D., for left knee problems which led to a total left knee replacement. During the pre-surgery examination, Dr. Gurba examined claimant's right upper extremity, including his right shoulder and found no problems with a full range of motion of the right shoulder being noted. Claimant testified that, prior to using the cane, he was having no problems with his right shoulder.

At an examination with Dr. Blatt, on April 16, 2010, claimant again expressed reluctance to undergo any additional surgery. However, by November 4, 2011, claimant's pain had progressed to the point he was willing to undergo the recommended back surgery. By this time claimant was complaining of right shoulder pain with tingling in his hand. By March 5, 2012, claimant and Dr. Blatt had agreed on the surgery and an extension of claimant's fusion to L2 was planned. The surgery scheduled for March was canceled and rescheduled for June 21, 2012. On June 13, 2012, claimant reported using a cane and walking hunched over with significant right shoulder pain from the use of the cane. Dr. Blatt suspected an impingement syndrome. By August 13, 2012, claimant was 6 weeks post surgery and showed improved leg pain, but with ongoing back pain. Claimant continued to express concern over his right shoulder pain from the continued use

of the cane. On September 24, 2012, claimant continued with some back pain. The shoulder pain also continued and Dr. Blatt recommended an evaluation by an orthopedic surgeon.

On December 5, 2012, claimant was examined by Dr. Barnthouse for his right shoulder complaints. Initially, Dr. Barnthouse suspected a right shoulder rotator cuff tear and referred claimant for an MRI of the shoulder. However, the December 7, 2012, MRI found the rotator cuff to be intact. Claimant was diagnosed with moderate changes in the acromioclavicular joint, bursal fraying along the supraspinatus tendon, partial tearing in the superior biceps tendon with an additional longitudinal split and a possible SLAP tear with posterior extension through the posterior labrum and moderate joint effusion in the shoulder joint. Surgical intervention was recommended including an arthroscopy of the shoulder, a biceps tenotomy, labral surgery, possible subacromial decompression and resection of the distal clavicle.

Dr. Barnthouse, in his letter of January 11, 2013, opined that claimant's symptoms were related to his use of the cane. The cane was noted to be the source of claimant's increasing pain and the current need for medical treatment. Dr. Barnthouse's reports do not note claimant's right shoulder problems, including surgery, in 2002, although claimant testified to telling him of the prior problems. Claimant acknowledged using a cane in 2010, after a left lower extremity total knee replacement, but did not tell Dr. Barnthouse of the left knee surgery.

Claimant was referred to orthopedic surgeon, Erich J. Lingenfelter, M.D., for an examination on March 29, 2013, regarding claimant's right shoulder complaints. Dr. Lingenfelter diagnosed claimant with chronic right shoulder pain, with a positive impingement test and tenderness over the bicipital groove. Claimant displayed a nonphysiologic pattern of pain and was resistant during range of motion testing. Dr. Lingenfelter acknowledged it was plausible that chronic use of a cane could lead to rotator cuff overload. However, he did not believe claimant was stooping over far enough and claimant's gait was not so antalgic to justify such a finding. He also noted documentation of claimant's previous rotator cuff tendinitis and pain indicating a preexisting issue. He was unable to find claimant's use of the cane was the primary prevailing factor in the development of his right shoulder problems. Intrasubstance tendinosis was identified as age-related, natural wear and tear, but Dr. Lingenfelter agreed the work up on claimant may have been inadequate. A right shoulder arthrogram indicated an extensive partial-thickness tear of the proximal long head of the biceps tendon, extensive degenerative tearing of the superior labrum and moderate AC joint arthrosis.

On cross-examination, claimant was asked about an examination by his family physician, John May, M.D., on November 2, 2011. Claimant presented with shoulder and leg pain. He was diagnosed with right shoulder rotator cuff with frozen shoulder. It was noted that claimant had already begun using the cane at this time. The report does not mention the use of the cane as the cause of the shoulder complaints. There was a note

that claimant reported no acute injury, but work was causing a problem. This would have been during the time claimant was working for Pentair.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 1990 Supp. 44-44-501(a) states:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4] The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[6]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[7]

The evidence conflicts as to whether claimant's right shoulder problems stem from the use of the cane or at least partially are the result of long term degeneration. The ALJ identified the injuries to the labrum and AC joint as degenerative, age-related conditions and not the natural consequence of claimant's cane use. However, the tear of the biceps tendon was not determined to be degenerative and was likely the result of the use of the

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[4] K.S.A. 1990 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

cane. He went on to order respondent to provide treatment for that biceps tendon tear, but not the treatment of the degenerative problems not associated with the cane use. While this is an unusual result, the Kansas Workers Compensation Act requires an employer to provide medical services "as may be reasonably necessary to cure and relieve the employee from the effects of the injury."[8] In this instance that has been accomplished. This Board Member finds the Order of the ALJ to be appropriate and affirms same.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proven that he suffered personal injury by accident to his right biceps tendon associated with the use of the cane as the result of his work-related accident to his low back on November 18, 1991. However, only a part of claimant's physical complaints stem from the use of the cane. Claimant has also displayed significant long term degeneration causing at least a portion of his ongoing problems. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated May 8, 2013, is affirmed.

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[8] K.S.A 1990 Supp. 44-510(a).

[9] K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
mek@kolichlaw.com

Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
tlutz@wallacesaunders.com

Richard H. Wagstaff, III, Attorney for Kansas Workers Compensation Fund
rwagstaffiii@sbg-law.com

Kenneth J. Hursh, Administrative Law Judge